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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS.

BRIEF FOR THE AMERICAN MUTUAL INSURANCE ALLIANCE, AMICUS CURIAE.

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THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS.

BRIEF OF THE AMERICAN MUTUAL INSURANCE ALLIANCE AS AMICUS CURIAE.

STATEMENT OF INTEREST AND POSITION.

The American Mutual Insurance Alliance is a trade association of 107 advance premium mutual fire and casualty insurance companies. Its offices are located at 20 North Wacker Drive, Chicago 6, Illinois.

Included in the membership of the American Mutual Insurance Alliance are companies which write all kinds of fire and casualty insurance, including accident and health. All are deeply concerned over the assertion by the Federal Trade Commission of jurisdiction over accident and health insurance advertising.

Upholding of this claim of jurisdiction would permit a federal agency to intrude upon a field of regulation which has heretofore been occupied by the states. This intrusion would occur in the face of a federal statute which was enacted for the specifically stated purpose of continuing state regulation (Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 70 Stat. 908, 15 U. S. C. 1011-1015, herein referred to as the McCarran Act).

Continuation of state regulation of insurance is of vital importance to the American Mutual Insurance Alliance. Following the holding in June 1944 by this Court, in *United States* v. *South-Eastern Underwriters Association,* that insurance was interstate commerce, the National Association of Insurance Commissioners consulted with insurance industry representatives as to means by which state regulation could be preserved. As a result of these deliberations, in November 1944 the N. A. I. C. submitted a legislative proposal to the Congress of the United States which became the basis of the McCarran Act. Consultation with members of Congress was had by the N. A. I. C. and industry representatives before that time and was continued until the McCarran Act became law on March 9, 1945.

The present General Manager of the Alliance, Newell R. Johnson, was Commissioner of Insurance of Minnesota and president of the National Association of Insurance Commissioners during the period in question. The late A. V. Gruhn, then General Manager of the Alliance, was among the industry representatives who consulted with the N. A. I. C. and with members of Congress. He was also a moving

spirit of the All-Industry Committee, established on recommendation of the N. A. I. C. to implement the McCarran Act by means of state legislation.

The attorneys filing this brief, *amicus curiae* are members of the Legal Committee of the Alliance, and are all executive officers or general counsel of their respective insurance companies, which in turn are members of the American Mutual Insurance Alliance. Among these attorneys are several who represented the Alliance on the All-Industry Committee, mentioned above.

The American Mutual Insurance Alliance has an interest in the question of whether the McCarran Act removes from the scope of the federal anti-trust laws such insurance activities as are regulated by state law. With respect to the instant cases, the interest of the Alliance is twofold: 1) To urge this Court that the Federal Trade Commission be held to be without jurisdiction. On this point the Alliance adopts the arguments contained in a consolidated *amicus curiae* brief being filed on behalf of other insurance associations. 2) To point out that upholding Federal Trade Commission jurisdiction in these cases would open the way to application of the Sherman Act to insurance rating activities which are regulated by state law. The latter point is argued in this brief because of its particular interest to the Alliance and the companies which comprise it, since the latter are customarily members or subscribers of fire and casualty rating bureaus. Life, accident and health insurance rates, on the other hand, are not developed through rating bureaus.

STATEMENT OF QUESTION.

The question presented by these cases is whether the jurisdiction asserted by the Federal Trade Commission over the advertising of the National Casualty Company and The American Hospital and Life Insurance Company exists in the face of the McCarran Act and in the face of state laws which regulate such advertising.

SUMMARY OF ARGUMENT.

In passing the McCarran Act, Congress had two purposes which are pertinent here. First, to express its desire that the states regulate the business of insurance, free of Commerce Clause limitations. Second, to express its intent that if laws regulating insurance were enacted by the states, such laws should oust the otherwise applicable enumerated statutes (with certain exceptions not relevant here), and to consent to such ouster.

The desire for state regulation of insurance and the intent to preclude federal jurisdiction over insurance activities as to which the states have specifically legislated are apparent from the general structure and language of the McCarran Act. Similarly, the legislative history of the McCarran Act shows that Congress intended that Federal Trade Commission jurisdiction should exist only in the absence of state regulation.

If a particular activity in the insurance business is regulated by state law, inquiry into whether such law is "consistent" or "inconsistent" with the federal statute is neither required nor permitted by the McCarran Act.

Existence of state law regulating an activity of itself excludes the Federal Trade Commission from jurisdiction over the activity.

Similarly, the McCarran Act permits of no distinction between the Federal Trade Commission Act and other federal anti-trust laws as regards their application to insurance activities which are regulated by state law. Specifically, if the Federal Trade Commission Act is held applicable to insurance advertising which is also regulated by state law, the Sherman Act may be held applicable to insurance rating practices, despite state rate regulatory laws. This would not only nullify a vast body of state law but also frustrate the will of Congress, expressed through passage of the McCarran Act, that the power to regulate the business of insurance be restored and preserved to the states and that the exercise of such power should oust the otherwise applicable federal acts.

ARGUMENT

I. The Purpose of Congress, in Passage of the McCarran Act, Was to Empower the States to Regulate the Business of Insurance to the Exclusion of the Federal Trade Commission.

In *Paul* v. *Virginia*, 8 Wall. 168 (1869), and consistently thereafter until 1944, this Court held that insurance was not commerce. Not being commerce, it could not be interstate commerce, and was not subject, therefore, to regulation by the federal government under the Commerce Clause of the Constitution. This left regulation of the business of insurance solely to the states.

During the seventy-five years following *Paul* v. *Virginia* all of the states developed systems of taxation and regulation of insurance company operations. Administration of these state laws was vested in a state official most commonly termed "insurance commissioner." These administering officers in turn made up the membership of the National Association of Insurance Commissioners, established in 1871 to study state and interstate insurance problems and to recommend practicable measures to the states.

On June 5, 1944, this Court held that insurance was commerce and, when crossing state lines, interstate commerce. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533.

There were two consequences of the *S.E.U.A.* decision which caused particular concern to the states, the insurance industry and Congress. First, the possession by Congress of exclusive power to regulate interstate commerce threatened the validity of existing state laws taxing

insurance companies, from which large revenues were derived by the states. Second, the *S.E.U.A.* case was an anti-trust suit. By holding the insurance business subject to the Sherman Act, a direct conflict was created with practices long authorized, and sometimes required, by state law. For example, the laws of some states permitted or required insurance companies to fix rates, on the basis of pooled experience, by acting in concert through rating bureaus supervised by the states.

The making of rates by insurance rating bureaus and the use of pooled experience as a basis for such rates is highly desirable. In contrast to the seller of a commodity, who knows, or can ascertain, the exact price of his product, the largest element in an insurance rate—the loss factor—is not known in advance. It can only be estimated on the basis of an average of what that particular coverage has cost in the past. An old and very large company, if it has kept elaborate records and has been writing the particular coverage for a considerable period, may be able to do a fairly accurate job on its own. But if the company is young or small, or its records are not extensive, it may arrive at a wrong rate. If that rate is too high, it will not sell much business and those who do buy from it will have paid too much. If the rate is too low and much business is sold, insolvency of the company is apt to result and those who bought the insurance may face catastrophe.

The best way to make proper insurance rates, therefore, is to combine the experience of many insurers. The broader the base, the more accurate the result. Under the Sherman Act, however, collaborative action of the type generally regarded as necessary for sound insurance rate making would be regarded as illegal price fixing.

The National Association of Insurance Commissioners and the industry were in agreement that an effort should be made to strengthen and preserve state regulation of

insurance. Able lawyers were included in the membership of the N. A. I. C., and the industry placed further expert help at its disposal. As a result the National Association of Insurance Commissioners presented to the Congress of the United States a legislative proposal in November of 1944. This proposal became the basis of the bill (S. 340) which on March 9, 1945 became Public Law 15, 79th Congress, known as the McCarran Act.

The legislative proposal submitted to Congress by the Executive Committee of the National Association of Insurance Commissioners shows clearly that their aim was to restore the regulation of insurance to the states. For example, the "Declaration of Policy" section of the Memorandum of Explanation of the N. A. I. C. legislative proposal stated:

> The National Association of Insurance Commissioners sincerely believes that the states can adequately regulate the insurance business, and because of legal considerations and the close proximity of state supervisory officials to the people affected, are in a better position to regulate that business than the Federal Government. In that regard it has regulatory machinery available, including regulatory statutes and trained personnel. It is our understanding that Congress shares this belief. It is therefore regarded as essential that Congress should declare its policy and its will.

The Memorandum subsequently dealt specifically with Federal Trade Commission jurisdiction as follows:

> It is quite obvious that if the regulation of the insurance business is to continue in the several states, that any possible application of the Federal Trade Commission Act to that business should be excluded; this, if for no other reason than that the states can satisfactorily perform the functions which the Commission might be called upon or elect to exercise.*

* See N. A. I. C. Proc. 1945, pp. 34-40, for full text of the Memorandum.

Similarly, the August 29, 1944 report of the Subcommittee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, later incorporated in the legislative proposal of the N. A. I. C., stated:

> The several states are empowered to deal with improper practices. To permit the Federal Trade Commission to exercise the same power would mean either duplication or overlapping of the same functions. Furthermore, in view of the present trend to expand the area of what constitutes interstate commerce the Federal Trade Commission might well preempt this field to the exclusion of the states. The public interest requires that wherever possible the functions of government be exercised by that unit of government closest to the people. In this instance it is manifest that the insurance departments of the various states are far closer to the problem and better able to serve than a detached central bureau.*

It is evident that Congress was urged by the industry and the National Association of Insurance Commissioners to restore to the states full authority to regulate the business of insurance which the *South-Eastern Underwriters* decision had taken away. It also is clear that Congress, in enacting the McCarran Act, which followed in substance the N. A. I. C. legislative proposal, believed it was returning the regulation of insurance to the states and effectively consenting to such regulation, free from Commerce Clause limitations. Congress also expressed its intent that state regulatory laws should oust corresponding federal statutes. This intent is implicit in the enactment of the McCarran Act, because of its background; it is clearly evidenced by many passages from the debate on the measure in Congress, and it is clearly stated in the act itself.

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* See N. A. I. C. Proc. 1945, pp. 23-31, for full text of the report.

II. The Language and General Structure of the McCarran Act Specifically Preclude the Assertion by the Federal Trade Commission of Jurisdiction Over Insurance Activities as to Which the States Have Legislated.

Argument on the above point is included as Point I in the consolidated *amicus curiae* brief being filed with this Court in these cases for the Life Insurance Association of America, the American Life Convention and the Health Insurance Association of America (hereinafter called the "consolidated *amicus* brief").

The argument under Point I of the consolidated *amicus* brief is hereby adopted.

III. The Legislative History of the McCarran Act Shows That Congress Intended That Federal Trade Commission Jurisdiction Should Exist Only in the Absence of State Legislation.

Argument on the above point is set out under Point II of the consolidated *amicus* brief. That argument is hereby adopted.

IV. The Arguments and Authorities Relied Upon by the Commission Do Not Support the Suggestion That Congress Intended That the McCarran Act Should Oust Federal Trade Commission Jurisdiction Only in the Event of "Inconsistent" State Legislation.

Argument on the above point is set out under Point III of the consolidated *amicus* brief. That argument is hereby adopted.

V. No Distinction Is Permitted, Under the McCarran Act, Between the Federal Trade Commission Act and Other Federal Anti-Trust Laws as Regards Application to Insurance Activities Which Are Regulated by State Law.

As stated in Point I of this brief, it was recognized immediately after the *South-Eastern Underwriters* decision that there was a direct conflict between existing state laws and practices, particularly as to insurance rate making, and the Sherman Act. What was required, authorized or permitted under state law would constitute illegal price-fixing under the Sherman Act.

The foregoing is illustrated by the report of the Subcommittee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, previously referred to. Pertinent excerpts are set out below.

> One of the immediate effects of this decision [S. E. U. A.] was to make applicable to the insurance business a series of federal acts which will be, in many instances, in direct conflict with the provisions of state laws.
>
> * * * Moreover, companies, boards, officers and employees, relying upon what they regarded as the established law of the land, may have become overnight subject to criminal liability—all in the absence of an act of Congress specifically regulating the insurance business.
>
> * * * * *
>
> The objective of the anti-trust acts is that competition shall be free and unfettered. The courts have said that agreements to fix prices, no matter how benevolent or well intentioned, are illegal *per se*. Experience has demonstrated that unrestricted competition in the insurance business is not in the public interest. Practically every state in the Union has

> upon its statute book provisions prohibiting unfair discrimination in rates. If unfair discrimination is to be avoided, there must be reasonable uniformity in the rates. Such uniformity can be obtained only by cooperation in obtaining statistical data and in the promulgation of rates based thereon. This result can be obtained only through concert of action.
>
> • • • • •
>
> For these and other reasons this sub-committee believes it would be a mistake to permit or require the unrestricted competition contemplated by the anti-trust laws to apply to the insurance business. To prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business. We do not regard it as necessary to labor this point any further because Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate making when it enacted the District of Columbia fire insurance rating act.

Thus it will be seen that Congress, when passing the McCarran Act, was fully aware that state rate regulatory laws were in conflict with the Sherman Act. It was obviously with the purpose of resolving this conflict in favor of state regulation that Congress exempted the business of insurance from application of the Sherman Act to the extent that such business is regulated by state law.

That the Sherman Act is ousted by state rate regulatory laws has been recognized by the courts. It was so held in *North Little Rock Transportation Company* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (8th Cir., 1950), on which writ of certiorari was denied by this Court, 340 U. S. 823 (1950). This fact is also conceded in the brief for the Federal Trade Commission. What counsel for the Commission fail to recognize is that there is absolutely nothing in the McCarran Act which permits of any distinction or difference in the application of the Sherman

Act and the Federal Trade Commission Act to insurance activities which are regulated by state law.

The Sherman Act and the Federal Trade Commission Act are referred to in Sections 2(b) and 3(a) of the McCarran Act. In each instance they are included in an enumeration of the federal acts known as the anti-trust laws, and both are on precisely the same footing. Only in Section 3(b) are the two acts treated differently, and then it is the Sherman Act, *not* the Federal Trade Commission Act, which is singled out for special treatment.*

As shown, no distinction is made or permitted to be made under Section 2(b) of the McCarran Act as between the Sherman Act and the Federal Trade Commission Act. Therefore, if the Federal Trade Commission Act applies to insurance activities which are regulated by state law, as contended by counsel for the Commission, the same construction can be applied with respect to the Sherman Act.

On the premise that the McCarran Act gave the states the power to make the Sherman Act inapplicable to rating activities regulated by state law, the state insurance commissioners and the insurance industry supported the enactment of model rate regulatory statutes for fire and casualty insurance. These model bills were passed, or existing laws were amended to provide additional regulatory features, by the legislatures of all states. The state insurance commissioners, the fire and casualty insurance companies, and the rate making and rate advisory organizations throughout the country have been operating for more than ten years in accordance with these state rate regulatory laws.

If the Commission prevails and the Federal Trade Com-

* Section 3(b) provides that nothing contained in the McCarran Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or any act of boycott, coercion or intimidation.

mission Act is held applicable to insurance advertising which is regulated by state law, then the Sherman Act similarly could be held applicable to rating activities which are also regulated by state law. The state rate regulatory laws are not "self-executing," as claimed in the brief of counsel for the Commission (page 53), and therefore are not distinguishable on such grounds from statutes prohibiting false advertising or other unfair or deceptive acts or practices.

If the Sherman Act applies to insurance rating activities which are regulated by state law, a vast body of state legislation will be made a nullity. In addition, the states and the business of insurance will be plunged back into the uncertainties and difficulties with they were faced following the *South-Eastern Underwriters* decision, and from which the McCarran Act was designed to rescue them.

Under the theory of counsel for the Commission, carried to its logical conclusion, the McCarran Act accomplished nothing. This is in direct conflict with the principle of statutory construction under which a legislative body is not to be presumed to have done a vain thing in the enactment of a statute. Furthermore, such an interpretation cannot be justified under the historical events which led to the enactment of the McCarran Act, the plain language of the statute itself or the meaning ascribed to it by this Court.

VI. Insurance Advertising Is "Regulated by State Law" When States Adopt Comprehensive Regulatory Statutes Specifically Dealing With the Subject.

Argument on the above point is set out under Point IV of the consolidated *amicus* brief. That argument is hereby adopted.

VII. Exclusive State Regulation of Insurance Advertising Does Not Result in a "Regulatory No-Man's Land."

Argument on the above point is set out under Point V of the consolidated *amicus* brief. That argument is hereby adopted.

Conclusion.

For the foregoing reasons, we believe the Federal Trade Commission to be without jurisdiction in the instant cases. We therefore respectfully urge that the judgments of the Courts of Appeals be affirmed.

Respectfully submitted,

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